S. 2046

To amend the Immigration and Nationality Act to modify the requirements of the visa waiver program and for other purposes.

IN THE SENATE OF THE UNITED STATES

January 31, 2012

Ms. Mikulski (for herself and Mr. Kirk) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Immigration and Nationality Act to modify the requirements of the visa waiver program and for other purposes.

- 1 Be it enacted by the Senate and House of Representa-
- 2 tives of the United States of America in Congress assembled,
- 3 SECTION 1. SHORT TITLE.
- 4 This Act may be cited as the "Visa Waiver Program
- 5 Enhanced Security and Reform Act".
- 6 SEC. 2. DEFINITIONS.
- 7 (a) Definitions.—Section 217(c)(1) of the Immi-
- 8 gration and Nationality Act (8 U.S.C. 1187(c)(1)) is
- 9 amended to read as follows:

| 1 | "(1) Authority to designate; defini- |
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| 2 | TIONS.— |
| 3 | "(A) AUTHORITY TO DESIGNATE.—The |
| 4 | Secretary of Homeland Security, in consultation |
| 5 | with the Secretary of State, may designate any |
| 6 | country as a program country if that country |
| 7 | meets the requirements under paragraph (2). |
| 8 | "(B) Definitions.—In this subsection: |
| 9 | "(i) Appropriate congressional |
| 10 | COMMITTEES.—The term 'appropriate con- |
| 11 | gressional committees' means— |
| 12 | "(I) the Committee on Foreign |
| 13 | Relations, the Committee on Home- |
| 14 | land Security and Governmental Af- |
| 15 | fairs, and the Committee on the Judi- |
| 16 | ciary of the Senate; and |
| 17 | "(II) the Committee on Foreign |
| 18 | Affairs, the Committee on Homeland |
| 19 | Security, and the Committee on the |
| 20 | Judiciary of the House of Representa- |
| 21 | tives. |
| 22 | "(ii) Overstay rate.— |
| 23 | "(I) Initial designation.—The |
| 24 | term 'overstay rate' means, with re- |
| 25 | spect to a country being considered |

| 1 | for designation in the program, the |
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| 2 | ratio of— |
| 3 | "(aa) the number of nation- |
| 4 | als of that country who were ad- |
| 5 | mitted to the United States on |
| 6 | the basis of a nonimmigrant visa |
| 7 | under section 101(a)(15)(B) |
| 8 | whose periods of authorized stay |
| 9 | ended during a fiscal year but |
| 10 | who remained unlawfully in the |
| 11 | United States beyond such peri- |
| 12 | ods; to |
| 13 | "(bb) the number of nation- |
| 14 | als of that country who were ad- |
| 15 | mitted to the United States on |
| 16 | the basis of a nonimmigrant visa |
| 17 | under section 101(a)(15)(B) |
| 18 | whose periods of authorized stay |
| 19 | ended during that fiscal year. |
| 20 | "(II) Continuing designa- |
| 21 | TION.—The term 'overstay rate' |
| 22 | means, for each fiscal year after ini- |
| 23 | tial designation under this section |
| 24 | with respect to a country, the ratio |
| 25 | of— |

| 1 | "(aa) the number of nation- |
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| 2 | als of that country who were ad- |
| 3 | mitted to the United States |
| 4 | under this section or on the basis |
| 5 | of a nonimmigrant visa under |
| 6 | section 101(a)(15)(B) whose pe- |
| 7 | riods of authorized stay ended |
| 8 | during a fiscal year but who re- |
| 9 | mained unlawfully in the United |
| 10 | States beyond such periods; to |
| 11 | "(bb) the number of nation- |
| 12 | als of that country who were ad- |
| 13 | mitted to the United States |
| 14 | under this section or on the basis |
| 15 | of a nonimmigrant visa under |
| 16 | section 101(a)(15)(B) whose pe- |
| 17 | riods of authorized stay ended |
| 18 | during that fiscal year. |
| 19 | "(III) Computation of over- |
| 20 | STAY RATE.—In determining the over- |
| 21 | stay rate for a country, the Secretary |
| 22 | of Homeland Security may utilize in- |
| 23 | formation from any available data- |
| 24 | bases to ensure the accuracy of such |
| 25 | rate. |

| 1 | "(iii) Program country.—The term |
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| 2 | 'program country' means a country des- |
| 3 | ignated as a program country under sub- |
| 4 | paragraph (A).". |
| 5 | (b) Technical and Conforming Amendments.— |
| 6 | Section 217 of the Immigration and Nationality Act (8 |
| 7 | U.S.C. 1187) is amended as follows: |
| 8 | (1) By striking "Attorney General" each place |
| 9 | the term appears and inserting "Secretary of Home- |
| 10 | land Security", except in subsection (c)(11)(B). |
| 11 | (2) In subsection (c)(2)(C)(iii), by striking |
| 12 | "Committee on the Judiciary and the Committee on |
| 13 | International Relations of the House of Representa- |
| 14 | tives and the Committee on the Judiciary and the |
| 15 | Committee on Foreign Relations of the Senate" and |
| 16 | inserting "appropriate congressional committees". |
| 17 | (3) In subsection (c)(5)(A)(i)(III), by striking |
| 18 | "Committee on the Judiciary, the Committee on |
| 19 | Foreign Affairs, and the Committee on Homeland |
| 20 | Security, of the House of Representatives and the |
| 21 | Committee on the Judiciary, the Committee on For- |
| 22 | eign Relations, and the Committee on Homeland Se- |
| 23 | curity and Governmental Affairs of the Senate" and |
| 24 | inserting "appropriate congressional committees". |
| 25 | (4) By striking subsection (c)(7)(E). |

| 1 | SEC. 3. DESIGNATION OF PROGRAM COUNTRIES BASED ON |
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| 2 | OVERSTAY RATES. |
| 3 | (a) In General.—Section 217(c)(2)(A) of the Immi- |
| 4 | gration and Nationality Act (8 U.S.C. 1187(c)(2)(A)) is |
| 5 | amended to read as follows: |
| 6 | "(A) GENERAL NUMERICAL LIMITA- |
| 7 | TIONS.— |
| 8 | "(i) Low nonimmigrant visa re- |
| 9 | FUSAL RATE.—The percentage of nationals |
| 10 | of that country refused nonimmigrant visas |
| 11 | under section 101(a)(15)(B) during the |
| 12 | previous full fiscal year was not more than |
| 13 | 3 percent of the total number of nationals |
| 14 | of that country who were granted or re- |
| 15 | fused nonimmigrant visas under such sec- |
| 16 | tion during such year. |
| 17 | "(ii) Low nonimmigrant overstay |
| 18 | RATE.—The overstay rate for that country |
| 19 | was not more than 3 percent during the |
| 20 | previous fiscal year.". |
| 21 | (b) Qualification Criteria.—Section 217(c)(3) of |
| 22 | the Immigration and Nationality Act (8 U.S.C. |
| 23 | 1187(c)(3)) is amended to read as follows: |
| 24 | "(3) QUALIFICATION CRITERIA.—After the ini- |
| 25 | tial period, a country may not be designated as a |
| 26 | program country unless the Secretary of Homeland |

| 1 | Security, in consultation with the Secretary of State, |
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| 2 | determines, pursuant to the requirements of para- |
| 3 | graph (5), that designation will be continued.". |
| 4 | (c) Continuing Designation.—Section |
| 5 | 217(c)(5)(A)(i)(II) of the Immigration and Nationality |
| 6 | Act (8 U.S.C. 1187(c)(5)(A)(i)(II)) is amended to read |
| 7 | as follows: |
| 8 | "(II) shall determine, based upon |
| 9 | the evaluation in subclause (I), wheth- |
| 10 | er any such designation under sub- |
| 11 | section (d) or (f), or probation under |
| 12 | subsection (f), ought to be continued |
| 13 | or terminated;". |
| 14 | (d) Computation of Visa Refusal Rates; Judi- |
| 15 | CIAL REVIEW.—Section 217(c)(6) of the Immigration and |
| 16 | Nationality Act (8 U.S.C. 1187(c)(6)) is amended to read |
| 17 | as follows: |
| 18 | "(6) Computation of VISA Refusal Rates |
| 19 | AND JUDICIAL REVIEW.— |
| 20 | "(A) Computation of VISA Refusal |
| 21 | RATES.—For purposes of determining the eligi- |
| 22 | bility of a country to be designated as a pro- |
| 23 | gram country, the calculation of visa refusal |
| 24 | rates shall not include any visa refusals which |
| 25 | incorporate any procedures based on, or are |

| 1 | otherwise based on, race, sex, or disability, un- |
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| 2 | less otherwise specifically authorized by law or |
| 3 | regulation. |
| 4 | "(B) Judicial review.—No court shall |
| 5 | have jurisdiction under this section to review |
| 6 | any visa refusal, the Secretary of State's com- |
| 7 | putation of a visa refusal rate, the Secretary of |
| 8 | Homeland Security's computation of an over- |
| 9 | stay rate, or the designation or nondesignation |
| 10 | of a country as a program country.". |
| 11 | (e) VISA WAIVER INFORMATION.—Section 217(c)(7) |
| 12 | of the Immigration and Nationality Act (8 U.S.C. |
| 13 | 1187(c)(7)) is amended— |
| 14 | (1) by striking subparagraphs (B) through (E); |
| 15 | and |
| 16 | (2) by striking "Waiver information—" and |
| 17 | all that follows through "In refusing" and inserting |
| 18 | "Waiver information—In refusing". |
| 19 | (f) Waiver Authority.—Section 217(c)(8) of the |
| 20 | Immigration and Nationality Act (8 U.S.C. 1187(c)(8)) |
| 21 | is amended to read as follows: |
| 22 | "(8) Waiver authority.—The Secretary of |
| 23 | Homeland Security, in consultation with the Sec- |
| 24 | retary of State, may waive the application of para- |
| 25 | graph (2)(A)(i) for a country if— |

| 1 | "(A) the country meets all other require- |
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| 2 | ments of paragraph (2); |
| 3 | "(B) the Secretary of Homeland Security |
| 4 | determines that the totality of the country's se- |
| 5 | curity risk mitigation measures provide assur- |
| 6 | ance that the country's participation in the pro- |
| 7 | gram would not compromise the law enforce- |
| 8 | ment, security interests, or enforcement of the |
| 9 | immigration laws of the United States; |
| 10 | "(C) there has been a general downward |
| 11 | trend in the percentage of nationals of the |
| 12 | country refused nonimmigrant visas under sec- |
| 13 | tion 101(a)(15)(B); |
| 14 | "(D) the country consistently cooperated |
| 15 | with the Government of the United States on |
| 16 | counterterrorism initiatives, information shar- |
| 17 | ing, preventing terrorist travel, and extradition |
| 18 | of the country's nationals to the United States |
| 19 | before the date of its designation as a program |
| 20 | country, and the Secretary of Homeland Secu- |
| 21 | rity and the Secretary of State assess that such |
| 22 | cooperation is likely to continue; and |
| 23 | "(E) the percentage of nationals of the |
| 24 | country refused a nonimmigrant visa under sec- |
| 25 | tion 101(a)(15)(B) during the previous full fis- |

| 1 | cal year was not more than 10 percent of the |
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| 2 | total number of nationals of that country who |
| 3 | were granted or refused such nonimmigrant |
| 4 | visas.". |
| 5 | SEC. 4. TERMINATION OF DESIGNATION; PROBATION. |
| 6 | Section 217(f) of the Immigration and Nationality |
| 7 | Act (8 U.S.C. 1187(f)) is amended to read as follows: |
| 8 | "(f) Termination of Designation; Probation.— |
| 9 | "(1) Definitions.—In this subsection: |
| 10 | "(A) Probationary Period.—The term |
| 11 | 'probationary period' means the fiscal year in |
| 12 | which a probationary country is placed in pro- |
| 13 | bationary status under this subsection. |
| 14 | "(B) Program country.—The term 'pro- |
| 15 | gram country' has the meaning given that term |
| 16 | in subsection (c)(1)(B). |
| 17 | "(2) Determination, notice, and initial |
| 18 | PROBATIONARY PERIOD.— |
| 19 | "(A) DETERMINATION OF PROBATIONARY |
| 20 | STATUS AND NOTICE OF NONCOMPLIANCE.—As |
| 21 | part of each program country's periodic evalua- |
| 22 | tion required by subsection (c)(5)(A), the Sec- |
| 23 | retary of Homeland Security shall determine |
| 24 | whether a program country is in compliance |

with the program requirements under subparagraphs (A)(ii) through (F) of subsection (c)(2).

"(B) Initial probationary period.—If the Secretary of Homeland Security determines that a program country visa is not in compliance with the program requirements under subparagraphs (A)(ii) through (F) of subsection (c)(2), the Secretary of Homeland Security shall place the program country in probationary status for the fiscal year following the fiscal year in which the periodic evaluation is completed.

"(3) ACTIONS AT THE END OF THE INITIAL PROBATIONARY PERIOD.—At the end of the initial probationary period of a country under paragraph (2)(B), the Secretary of Homeland Security shall take 1 of the following actions:

"(A) COMPLIANCE DURING INITIAL PROBA-TIONARY PERIOD.—If the Secretary determines that all instances of noncompliance with the program requirements under subparagraphs (A)(ii) through (F) of subsection (c)(2) that were identified in the latest periodic evaluation have been remedied by the end of the initial

| 1 | probationary period, the Secretary shall end the |
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| 2 | country's probationary period. |
| 3 | "(B) Noncompliance during initial |
| 4 | PROBATIONARY PERIOD.—If the Secretary de- |
| 5 | termines that any instance of noncompliance |
| 6 | with the program requirements under subpara- |
| 7 | graphs (A)(ii) through (F) of subsection (c)(2) |
| 8 | that were identified in the latest periodic eval- |
| 9 | uation has not been remedied by the end of the |
| 10 | initial probationary period— |
| 11 | "(i) the Secretary may terminate the |
| 12 | country's participation in the program; or |
| 13 | "(ii) on an annual basis, the Secretary |
| 14 | may continue the country's probationary |
| 15 | status if the Secretary, in consultation |
| 16 | with the Secretary of State, determines |
| 17 | that the country's continued participation |
| 18 | in the program is in the national interest |
| 19 | of the United States. |
| 20 | "(4) Actions at the end of additional |
| 21 | PROBATIONARY PERIODS.—At the end of all proba- |
| 22 | tionary periods granted to a country pursuant to |
| 23 | paragraph (3)(B)(ii), the Secretary shall take one of |

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the following actions:

"(A) Compliance during additional period.—The Secretary shall end the country's probationary status if the Secretary determines during the latest periodic evaluation required by subsection (c)(5)(A) that the country is in compliance with the program requirements under subparagraphs (A)(ii) through (F) of subsection (c)(2).

"(B) NONCOMPLIANCE DURING ADDITIONAL PERIODS.—The Secretary shall terminate the country's participation in the program if the Secretary determines during the latest periodic evaluation required by subsection (c)(5)(A) that the program country continues to be in non-compliance with the program requirements under subparagraphs (A)(ii) through (F) of subsection (c)(2).

"(5) EFFECTIVE DATE.—The termination of a country's participation in the program under paragraph (3)(B) or (4)(B) shall take effect on the first day of the first fiscal year following the fiscal year in which the Secretary determines that such participation shall be terminated. Until such date, nationals of the country shall remain eligible for a waiver under subsection (a).

| 1 | "(6) Treatment of nationals after termi- |
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| 2 | NATION.—For purposes of this subsection and sub- |
| 3 | section (d)— |
| 4 | "(A) nationals of a country whose designa- |
| 5 | tion is terminated under paragraph (3) or (4) |
| 6 | shall remain eligible for a waiver under sub- |
| 7 | section (a) until the effective date of such ter- |
| 8 | mination; and |
| 9 | "(B) a waiver under this section that is |
| 10 | provided to such a national for a period de- |
| 11 | scribed in subsection (a)(1) shall not, by such |
| 12 | termination, be deemed to have been rescinded |
| 13 | or otherwise rendered invalid, if the waiver is |
| 14 | granted prior to such termination. |
| 15 | "(7) Consultative role of the secretary |
| 16 | OF STATE.—In this subsection, references to sub- |
| 17 | paragraphs (A)(ii) through (F) of subsection (c)(2) |
| 18 | and subsection $(c)(5)(A)$ carry with them the con- |
| 19 | sultative role of the Secretary of State as provided |
| 20 | in those provisions.". |
| 21 | SEC. 5. REVIEW OF OVERSTAY TRACKING METHODOLOGY. |
| 22 | Not later than 180 days after the date of the enact- |
| 23 | ment of this Act, the Comptroller General of the United |
| 24 | States shall conduct a review of the methods used by the |
| 25 | Secretary of Homeland Security— |

| 1 | (1) to track aliens entering and exiting the |
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| 2 | United States; and |
| 3 | (2) to detect any such alien who stays longer |
| 4 | than such alien's period of authorized admission. |

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